IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE, NO. 00-319 JOSEPH P. BAKER	)	Supreme Court Case No. SC00-2510

REPLY OF THE JUDICIAL QUALIFICATIONS COMMISSION TO JUDGE BAKER'S RESPONSE TO ORDER TO SHOW CAUSE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (cont'd)

Page

Cases (cont'd)

Statutes and Rules

Other Authorities

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A	)	Supreme Court
JUDGE, NO. 00-319	)	Case No. SC00-2510
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This Reply is submitted on behalf of the Judicial Qualifications Commission pursuant to the Court's order of June 18, 2001 to demonstrate that the findings of the Hearing Panel in the proceedings concerning Judge Joseph P. Baker are supported by clear and convincing evidence and that the Findings, Conclusions and Recommendations should be approved.

SUMMARY OF THE ARGUMENT

Issue I - Although Judge Joseph P. Baker's conduct may have involved judicial error, it is clear that it constituted a violation of the Code of Judicial Conduct for which he may be disciplined.

Issue II - The evidence supports the charge that Judge Baker, without disclosure to counsel or the litigants, made inquiries of computer experts concerning technical issues relating to the issue of damages in a case pending before him and, although Judge Baker made reference to his having consulted the experts in an 8-page memorandum delivered to counsel during the trial, the fact of the consultation or what Judge Baker learned from the experts was never an issue during the trial. Judge Baker's having had improper communications with the computer experts impaired the confidence of the citizens of the state in the judicial system. Although the communication may not have been a dictionary definition of "ex parte communications," it was clearly an improper communication in violation of Canon 3B(7).

Issue III - Judge Baker's conduct is proscribed by Canon 3B(7) in that it is not disputed that he had communications with computer experts without the involvement of the litigants or their attorneys.

Issue IV - Federal Rule of Evidence 201 relating to judicial notice of adjudicative facts is not applicable to state court proceedings in the State of Florida. Judge

Baker's inquiries of the computer experts on factual issues bearing on the proof of damages in a computer software case did not involve "legislative" facts which federal judges are apparently free to consider.

Issue V - The Hearing Panel's findings and conclusions regarding the application of Canon 3B(7) are not unworkable and will not result in unavoidable, repeated unintentional violations and self-imposed judicial ignorance. The findings and conclusions are limited to the facts of the case which the Hearing Panel found did not present a close question.

Issue VI - Judge Baker does not seek exoneration or a new hearing based upon a violation of the due process clause of the Fourteenth Amendment and there is no reason for the Court to revisit the Commission's procedures.

ARGUMENT

ISSUE I

THE FORMAL CHARGES ARE FOR A VIOLATION OF THE CANONS AND NOT MERE JUDICIAL ERROR

It is not disputed that mere judicial error does not justify the imposition of disciplinary sanctions against

a judge. However, the law is clear that judicial error may also be the subject of judicial discipline. Thus, in In re Inquiry Concerning Perry, 641 So.2d 366 (Fla. 1994), this Court, in a judicial disciplinary proceeding, rejected the judge's argument that his alleged transgressions were nothing more than mere errors of law and should not be the subject of disciplinary proceedings, saying, "under the circumstances of this case, we find that the Commission's recommendation of a public reprimand is appropriate" (641 So.2d at 369). Many of the cases from other states cited by Judge Baker also make this clear: In re Conard, 944 S.W.2d 191 (Mo. 1997)(judge found guilty of misconduct in connection with contempt proceedings even though court of appeals had held order of contempt invalid and unenforceable); In re Conduct of Schenck, 318 Or. 402, 870 P.2d 185 (1994)(alleged good faith error of law not relevant to determination of whether the judge violated ethical canons, but was a factor in considering appropriate sanctions); Harrod v. Illinois Courts Comm'n, 69 Ill.2d 445, 372 N.E.2d 53 (1978)(fact that a judge's misconduct may be remedied by an appeal does not prevent same conduct from being the subject of a disciplinary proceeding).

In Matter of King, 409 Mass. 590, 568 N.E.2d 588 (1991), relied upon by Judge Baker, the Supreme Judicial Court of Massachusetts rejected the judge's argument that his decisions in connection with bail hearings were inappropriate for consideration by the Massachusetts Commission on Judicial Conduct because they were based on an exercise of judgment and reviewable on appeal. The court noted that although judges are generally immune from sanctions based solely on appealable errors of law or abuse of discretion, it rejected the judge's argument that neither the Commission nor the Court (outside of the usual avenue of appeal) could respond in a disciplinary proceeding.

The Hearing Panel, in its Findings and Conclusions, rejected Judge Baker's argument that he had merely committed legal error correctable on appeal, and concluded that the "receipt of ex-parte communications or other communications outside the presence of the parties may be both reversible legal error and an ethical violation." After reviewing the cases cited by Judge Baker in his prehearing memorandum, the Hearing Panel concluded that "[t]here is also absolutely no question that ex-parte

contacts in violation of the Florida canons do constitute an ethical violation subject to discipline by the Florida Supreme Court" (Findings and Conclusions, pp.17-19).[1]

ISSUE II, A

THE EVIDENCE SUPPORTS THE CHARGE THAT JUDGE BAKER, WITHOUT DISCLOSURE TO COUNSEL OR THE LITIGANTS, HAD COMMUNICATIONS IN VIOLATION OF CANON 3B(7)

The Notice of Formal Charges charged that Judge Baker, during the pendency before him of Universal Business Systems, Inc. v. Disney Vacation Club Management Corp., Case No. C10-95-3614, in the Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida ("UBS v. Disney"), "without disclosure to counsel or the litigants, . . . made inquiries of several computer consultants and

[1] References to pleadings and other papers filed in this proceeding will be by title and page or paragraph number. References to the trial transcript of Universal Business Systems, Inc. v. Disney Vacation Club Management Corp., Case No. C10-95-3614 (Circuit Court, Ninth Judicial Circuit, Orange County, Florida), will be "Tr.__." References to the transcript of the JQC Hearing will be "Hearing Tr.__." References to the exhibits introduced at the hearing will be either "JQC EX-__" or "Baker EX-__." Judge Baker's Response to Order to Show Cause will be referred to as "Response, p.__."

experts concerning technical issues relating to the issue of damages in the case." The Notice further charged that "[s]ubsequently, [Judge Baker] reduced a jury award of damages in favor of Universal Business Systems, Inc. to a nominal amount [and] [i]n [a] memorandum explaining [the] decision, [Judge Baker] disclosed for the first time that [he] had made these inquiries . . ." (Formal Charges, ¶ 1).

Judge Baker contends that the evidence does not support the formal charge because the Memorandum of Ruling dated July 5, 1999 was not the first time that he disclosed that he had made inquiries of consultants on the issue of damages (Response, pp.18-20).

Judge Baker relies upon the fact that on Friday, May 14, 1999, during the trial, he handed to counsel an 8-page memorandum entitled "History of the Case" (JQC EX-2). Judge Baker makes too much of the May 14 "disclosure." The memorandum was given to counsel on a Friday at the end of the trial day and trial week and almost at the conclusion of the plaintiff's case. There was a lengthy discussion of the damages issue, but Judge Baker made no

reference to or discuss with counsel his having consulted computer experts. Instead, Judge Baker told the lawyers:

> I might also mention, I have talked about the law clerks and whatever, I happened to have a couple of friends who are intellectual property lawyers in New York, one in New York and one in Portland - Portland, Oregon and I sent back a - in fact, a couple days ago I sent a draft of the nature of the case to them to see if they'd ever heard of anything like this. Perhaps they would have some suggestions and I haven't gotten any reply.

(Tr.925.) As noted by the Hearing Panel, the memorandum contained "vague references to conversations with the computer experts" and gave no details of whom the Judge had contacted (Findings and Conclusions, p.9). Moreover, there was no further discussion during the trial of the memorandum or of Judge Baker having consulted experts. Judge Baker admitted that the lawyers did not focus on the memorandum, neither lawyer ever responded to it and Judge Baker did not pursue it (Tr.50, 57, 59). Thus, the fact that Judge Baker had received some information from computer experts did not become of significance until he incorporated the information into his reasoning and ruling on the motion for directed verdict (JQC EX-1).

Judge Baker cites to the fact that neither party objected at trial to his having consulted with experts (Response, p.4). Yet, as found by the Hearing Panel, the notice to counsel came after Judge Baker had consulted with experts and "[t]here was little counsel could do about it at that point other than to seek a mistrial and possibly disqualification of the judge." The Hearing Panel further found that "[t]he fact that counsel proceeded with the case did not result in a waiver as to the court's ethical responsibilities not to engage in or consider such outside input from experts" (Findings and Conclusions, p.17).

Judge Baker, in his response, contends that his consultation with experts was not a point on appeal, but raised only in argument in UBS' brief without response by Disney. Judge Baker further claims that "according to counsel for Disney, it was not mentioned in oral argument before the Fifth DCA. Neither was it mentioned by Appellant UBS to the district court of appeal that Judge Baker had disclosed his conversations with consultants and experts in the draft delivered in court on May 14, 1999" (Response, pp.6-8). This may or may not accurately state

what happened in oral argument in the District Court because the testimony of the attorneys who handled the appeal was not offered in evidence and is not part of the record in this case. Thus, it appears that just as it is the issue in this proceeding, Judge Baker has gone outside the record to find support for his response to this Court.[2]

The District Court of Appeal found Judge Baker's reduction of the jury's verdict allowed Disney to benefit from its destruction of the software product and, by reducing the verdict, had improperly acted as a seventh juror. Universal Business Systems, Inc. v. Disney Vacation Club Management Corp., 768 So.2d 7 (Fla. 5th DCA 2000). The court also pointed out that:

> UBS also asserts that the trial court's ruling is flawed by its admitted participation in improper ex-parte communications regarding the issue of damages. This assertion is based on the trial court's statement contained in its Memorandum explaining its ruling:

[2] Judge Baker also implies or suggests that responses he and his counsel have received from the public appear to support the conduct for which the Hearing Panel found him guilty (Response, p.21). This, likewise, is not part of the record.

> I made a few inquiries of computer consultants and experts, describing the general nature of this task and asking if there were a practical way to approximate the cost to a retailer to take the original UBS software and bring it up to the "modified version" in use at Disney.
>
> The court went on to state that its decision was consistent with the input it had received from these consultants and experts. UBS argues that these conversations violate Canon 3 B(7) of the Code of Judicial Conduct.
>
> We do not make a comment as to whether the trial court violated Canon 3 B. However, it is clear from the trial court's own statement and the record before us that the trial court improperly considered information gleaned from ex-parte communications in reaching its decision to override the jury's verdict.

(768 S.2d at 8.)

The Hearing Panel, after hearing the evidence, has now found that Judge Baker did violate Canon 3B(7) and that finding should be approved.

ISSUE II, B

JUDGE BAKER'S CONDUCT IMPAIRS THE CONFIDENCE OF THE CITIZENS OF THIS STATE IN THE INTEGRITY OF THE JUDICIAL SYSTEM

Judge Baker contends that the evidence does not support the formal charge that if he were guilty of the acts charged it would impair the confidence of the citizens of this State in the integrity of the judicial system (Response, p.20). Judge Baker emphasizes the finding that he did not violate any canon other than Canon 3B(7), had no corrupt or bad motive, and that the Hearing Panel accepted his assertion that he was only seeking the truth (Response, pp.12-13). However, a finding of corrupt motive is not a prerequisite to disciplining a judge. In re Inquiry Concerning a Judge, Gridley, 417 So.2d 950, 951 (Fla. 1982); In re Inquiry Concerning a Judge, 357 So.2d 172, 180 (Fla. 1978). And, a judge may be disciplined even though his motives were good. In re Inquiry Concerning a Judge, Gridley, supra; In re Sturgis, 529 So.2d 281, 283 (Fla. 1988)(judge's overwhelming concern for welfare of children in large measure accounted for his resort to ex parte transgressions).

There can be little doubt that improper communications by a trial judge impairs the integrity of the judicial system. Thus, in State v. Romano, 34 Wash.App. 567, 662 P.2d 406 (Wash.App. 1983), the trial judge, while he had under consideration the sentencing of a defendant, contacted at least two friends in the jewelry business to verify the defendant's statements that his earnings as a jewelry salesman were seasonal. The Washington appellate court found this to be an improper ex parte communication prohibited by the Washington Code of Judicial Conduct and reversed and remanded for resentencing by another judge. In that case, the state asserted that the defendant was in no way prejudiced and that the judge's inquiries merely verified information provided by the defendant himself. In rejecting this argument, the court said:

> However, even where there is no actual bias, justice must satisfy the appearance of fairness . . . . The law goes further than requiring an impartial judge, it must also require that the judge appear to be impartial. Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised.

(662 P.2d at 407-08.) So, too, in this case, the Hearing Panel found that

> Judge Baker's approach is particularly troublesome for trial counsel. Counsel could not explain to their clients how judges can preside over a complex trial where all the witnesses must publicly testify and then have the judge contact experts who might well influence the judge in his final post-verdict decision, rendering the jury verdict ineffective. Counsel are entitled to try the case in the courtroom and not be told, after the fact, that the judge has already sought out and received input from other sources.

(Findings and Conclusions, p.18.)

Clearly, communications by the trial judge during the course of the decision-making process impairs the ability of litigants and their counsel to properly present their case, denies them due process and, therefore, impairs the integrity of the judicial system. Inquiry Concerning Miller, 644 So.2d 75, 77 (Fla. 1994).

In In re Marriage of Terry, 100 Wash.App. 1035, 2000 WL 426552 (Wash.App. 2000), the judge, in a marriage dissolution property dispute, conducted an independent investigation by securing certain bank records. The judge

preemptively notified the parties by letter of the need to acquire additional information and his concurrent issuance of subpoenas to a bank to resolve issues relating to bank funds. The appellate court, noting that although the trial judge's concern and diligence was laudable, held that he had acted improperly because the wife was hampered in her ability to respond or further develop a record and was deprived of the opportunity to object, cross-examine, explain the new evidence or offer other evidence. See also Fremont Indemnity Co. v. Workers' Compensation Appeals Board, 200 Cal.Rptr. 762, 153 Cal.App.3d 965 (Cal.App. 1984) (judge's communications with court-appointed, independent medical examiner to obtain further medical information denied petitioner a fair trial and due process of law); Gimbel v. Laramie, 5 Cal.Rptr. 88, 181 Cal.App.2d 77 (Cal.App. 1960)(it was a denial of due process for a trial judge to consult a friend who was an amateur photographer and who examined photographs of steering wheel to determine whether a driver was violently thrown forward in an automobile accident).

Judge Baker testified that other than medical malpractice cases where he looked at a glossary of medical

terms or anatomical charts, he could think of only two cases in which he sought outside information (Hearing Tr.115). Judge Baker cited Pokey's Citrus Nurseries v. Conner, Case No. CI88-4138, Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida, as the case other than UBS v. Disney in which he consulted experts (Hearing Tr.82-89). In that case, Judge Baker prepared a Case History (Baker EX-1), which was cited by this Court with approval in Department of Agriculture and Consumer Services v. Polk, 568 So.2d 35 (Fla. 1990)(McDonald, J. concurring, p.46 n.11). Although Judge Baker testified when questioned by his counsel that none of the lawyers in Pokey's Citrus Nurseries suggested that he was acting improperly (Hearing Tr.89), upon examination by Special Counsel, Judge Baker admitted that upon telling the attorneys what he intended to do, one of the attorneys wanted to be involved in the process, to which Judge Baker responded: "'You can do that if you want, but the only time I have to educate myself is in the evenings and on weekends to learn about biology . . . and I am reading books on biology from the library and what people are sending me and the only thing I can do is to say, do what you want to. . . .'" (Hearing Tr.100-01). Judge Baker

further testified that the lawyer "wanted to be there to cross-examine the evidence or see what I was learning. And I said that's not practical to do that. . . . 'That won't work, and you can't -- you can't do it that way. I can't conduct it that way' and that was the end of it" (Hearing Tr.107-08).

Judge Baker testified that:

> I believe . . . that I must be absolutely scrupulous about any information that I receive that might bear on a case. I must be absolutely scrupulous about informing the attorneys and giving them an opportunity to listen to it, to cross-examine the witnesses, to present contrary evidence, to do whatever they want to; . . . I believe that this is an absolute obligation that I have.

(Hearing Tr.122-23.) It does not appear, however, that Judge Baker gave the attorneys in the Pokey's Citrus Nurseries case the opportunity to listen and examine the experts from whom Judge Baker was receiving information.

Judge Baker, after having testified that only on two occasions could he recall having outside information concerning a case (Hearing Tr.115, 122), was asked about Super Vision International, Inc. v. Caruso, Case

No. CI99-9392, Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida, which involved a question of whether there are trade secrets in the fiber optic lighting business (Hearing Tr.128) and in which counsel for Super Vision learned that Judge Baker, a week after having been reversed in UBS v. Disney, had conducted independent research on the Internet as to what might be considered trade secrets and had communicated directly via e-mail with an expert at Renselaer Polytechnic Lighting Institute on the subject. Super Vision filed a motion to recuse, alleging that it had a well-grounded fear that it may not be able to obtain a fair trial because Judge Baker had conducted independent research without the knowledge of the parties, notwithstanding the fact that he had just been reversed for improperly participating in such communications. The motion to recuse was denied, after which Judge Baker published an article in the Orlando Sentinel newspaper on August 20, 2000, entitled "The truth about the whole truth in court." In the article, Judge Baker defended his right to pursue independent research and criticized the rules of evidence and procedure which prevent witnesses, lawyers, jurors or the judge from pursuing the truth in court proceedings. Super Vision,

believing that the article was, at least in part, a response to Super Vision's motion to recuse, filed a second motion to recuse (JQC EX-5).[3] This motion was also denied and the Fifth District Court of Appeal denied Super Vision's writ of prohibition in a 2-1 decision, Super Vision v. Caruso, 770 So.2d 759 (Fla. 5th DCA 2000). Judge Baker, nevertheless, recused himself from the Super Vision case when Super Vision's lawyer was listed as a witness in this proceeding (Hearing Tr.127-28).

Judge Baker listed as exhibits, but did not offer in evidence, two letters related to a first degree murder case Judge Baker tried in 1990, State v. Vining, Case No. CR89-2395. After Judge Baker had testified that he had never engaged in fact finding outside the evidence (Hearing Tr.122), the Commission introduced the letters (JQC EX-6 and EX-7) and examined Judge Baker regarding his conduct. Vining was convicted of first degree murder and armed robbery. Judge Baker imposed the death penalty for the first degree murder conviction and sentenced Vining as

[3] JQC EX-5 is Super Vision's Second Verified Motion for Recusal and Disqualification to which the first motion, Judge Baker's communication with the expert at Renselaer and his Orlando Sentinel article are attached as exhibits.

a habitual offender to life in prison on the armed robbery conviction. On appeal to this Court, Vining v. State, 637 So.2d 921 (Fla.), cert. denied, 513 U.S. 1022 (1994)(JQC EX-8), Vining contended that Judge Baker had improperly considered matters not presented in open court, including depositions in the court file, the medical examiner's report, and the probate record in the victim's estate. This Court found that the issue had been waived for purposes of appellate review because defense counsel had never objected to the court's consideration of this material, pointing out that the record contained the two letters in which Judge Baker advised counsel what he had done and what he had intended to do (637 So.2d at 927). In the first letter, dated March 1, 1990, Judge Baker advised counsel that:

> As I told you both on the telephone that I would do, I did call Dr. Thomas Hegert, the Orange County Medical Examiner, on Tuesday, February 27, 1990. I confirmed that the written autopsy report . . . is the only written report on the deceased . . . .

(JQC EX-6.) On March 14, 1990, after the sentencing phase of the trial, Judge Baker again wrote counsel, saying:

> During the trial and since the trial of this case I have read all of the depositions and have attempted to obtain documents referred to in the trial and the depositions that were not in evidence, such as Dr. Hegert's report and the probate records of the estate of the deceased, Georgia Caruso.
>
> Since I live in downtown Winter Park, I am familiar with that area where important events occurred in this case. Before sentencing, I expect to drive out to the Jamestown Shopping Center.
>
> It has always been my preference, as a lawyer and as a judge, to go to the places that I hear talked about or testified about. Usually, this is not possible in handling the volume of cases that I have, but in a case where there is a death or life imprisonment decision to make, I do not want to overlook anything that might make the case more clear and my decision more appropriate.

(JQC EX-7)(emphasis added).

Vining is now back before this Court on appeal from the denial of Vining's motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850, Vining v. State, Case No. 99-67.[4]

[4] The Commission, pursuant to Florida Statute 90.202(6), has filed a request that the Court take judicial notice of the record and briefs in Vining v. State, Case No. SC99-

The Commission takes no position with regard to the merits of Vining's appeal, but it is significant that Vining contends that he was denied his right to effective assistance of counsel and to a fair and impartial tribunal because he was sentenced to death based upon extra-record information. In Vining's appellate brief and the Record on Appeal at page 2630, Judge Baker's sentencing order is quoted:

> . . . As the judge presiding at guilt phase and the advisory sentence phase of the jury trial, I was present for all of the testimony and evidence introduced during both phases of the trial. Also, I have read all of the depositions transcribed and filed with the clerk of the court. I read a copy of the medical examiner's report and discussed it with him. I obtained copies of the Seminole County estate file on Georgia Dianne Caruso, deceased, and checked the claims filed in the estate which described jewelry consigned to the deceased at the time of her death, as corresponding to some of the jewelry appraised for her shortly before her disappearance. . . .

In the brief, Vining contends that the revelations in the sentencing order are only the tip of the iceberg as to

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67.

Judge Baker's consideration of extra-record information, including visiting the crime scene, but the information went unchallenged because, according to the brief, Judge Baker never disclosed what he had learned. For a full discussion of Vining's arguments on this point, see Appellant's Corrected Initial Brief in Vining v. State, Case No. 99-67, pp.40-52. The State, in the appeal, defends Judge Baker's actions (see Answer Brief of the Appellee, pp.35-44) and, again, the Commission has no position on the merits of the Vining case and calls this matter to the attention of the Court only because, no matter the outcome, Judge Baker's conduct has called into question the integrity of the judicial system.

ISSUE II, C

THE EVIDENCE SUPPORTS THE CHARGE THAT JUDGE BAKER HAD IMPROPER COMMUNICATIONS IN VIOLATION OF CANON 3B(7)

Judge Baker contends that the evidence does not support the formal charge that he had "ex parte" communications. The formal charge alleged that:

> During the pendency before you of the case of Universal Business Systems, Inc. v. Disney Vacation Club Management Corp., 2000 WL 905248 (Fla.

> 5th DCA 2000), without disclosure to counsel or the litigants, you made inquiries of several computer consultants and experts concerning technical issues relating to the issue of damages in the case. . . .
>
> The initiation of these inquiries and receipt of the advice . . . constituted initiation and receipt of improper ex-parte communications on your part.

(Notice of Formal Charges, ¶¶ 1, 2.). Judge Baker correctly claims that the dictionary definition of "ex parte communications" is communications done or made at the instance and for the benefit of one party only. Black's Law Dictionary (7th ed.). Judge Baker argues that the Hearing Panel did not find that he received communications from attorneys, parties or witnesses and, therefore, the JQC's Recommendations make new law on what is an ex parte communication (Response, p.23).

Judge Baker raised the same issue in a motion to dismiss the formal charges (Motion to Dismiss, ¶¶ 3, 7, 8). The Commission's response was two-fold: First, that the term "ex parte communications" has been used to refer to communications with disinterested third parties, e.g., State v. Romano, supra; Universal Business Systems, Inc.

v. Disney Vacation Club Management Corp., supra; and, second, Canon 3B(7) not only provides that "a judge shall not initiate, permit or consider ex parte communications," but also that a judge shall not "consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . ." The response also pointed out that the commentary to this provision states that the prescription against communications during a proceeding includes communications from lawyers, law teachers and other persons who are not participants in the proceedings and further advises that "a judge must not independently investigate facts in a case and must consider only the evidence presented" (Response to Motion to Dismiss, pp.3-6). The motion to dismiss was denied.

The Hearing Panel also considered and rejected Judge Baker's argument in its findings and conclusions, noting that Canon 3B(7) prohibits both "ex parte communications" and "other communications" outside the parties' presence and that Judge Baker could not suggest that he was not on notice of the nature of the charges or that he was unprepared to defend himself inasmuch as Judge Baker's

counsel, in opening remarks, stated that "one of the issues was how the phrase 'ex parte communications' followed by "other communications" is applied (Findings and Conclusions, p.14; Hearing Tr.11). Judge Baker's expert witnesses testified at some length on the subject of the meaning and applicability of the "other communications" provision of Canon 3B(7) (Hearing Tr.175-76, 190-91, 230-35).

The Hearing Panel concluded, based upon the Canon and the evidence, including the testimony of Judge Baker's experts (see discussion of Issue III), that "Canon 3B(7) prohibits both 'ex-parte communications' or 'other communications' outside the parties' presence [and] thus covers [the] admitted communications [of Judge Baker] whether they are viewed as classic ex-parte contacts or merely other communications." The Hearing Panel further concluded that "[i]n this situation, involving intentional reliance on initially undisclosed experts, we view 'other communications' as a subsection of 'ex-parte' communications and in the context of this case there is no substantial or substantive distinction" (Findings and Conclusions, p.14).

ISSUE III

CANON 3B(7) PROHIBITED JUDGE BAKER'S CONDUCT

Judge Baker contends (essentially contrary to his position on Issue II, C) that the proscription against "other communications" is an extension of the phrase "ex parte" and refers only to communications with interlopers, "i.e., someone who seeks to influence the judge on behalf of a party or a position in litigation" (Response, p.24). Judge Baker further contends that since he did not consult with one who was seeking to influence him, he did not violate Canon 3B(7). If the Court were to accept Judge Baker's narrow definition of "other communications" as relating only to communications with someone seeking to influence the judge or advocate a position, it would be impossible to determine if there was a violation in this case inasmuch as Judge Baker could not, before the Formal Hearing, remember who he talked to and still does not remember what they said (Hearing Tr.51-52, 196-98). Moreover, if the Court accepted Judge Baker's narrow definition of "other communications," he would be free to discuss his cases with anyone who he believed was not seeking to influence him. This is, in essence, what Judge

Baker is contending: He should be free to talk to anyone, as long as that person is not seeking to influence his decision, to obtain whatever information he feels he needs to understand a case. The litigants and their attorneys, however, would have no ability to listen, cross-examine or rebut the information the Judge was receiving.

ISSUE IV

FEDERAL RULE OF EVIDENCE 201 IS NOT APPLICABLE TO AND DOES NOT JUSTIFY JUDGE BAKER'S CONDUCT

Judge Baker contends that he relied in part on and his conduct is sanctioned by Federal Rule of Evidence 201 because he was consulting experts regarding "legislative facts" (Response, pp.29-31). Subsection (a) of the Federal Rule provides: "This rule governs only judicial notice of adjudicative facts." The Advisory Committee Notes state that "no rule deals with judicial notice of 'legislative' facts." The Committee Notes further explain that "adjudicative facts" are simply the facts of the particular case and "legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formation of a legal principle or a ruling by a judge or court or in the

enactment of a legislative body." Notwithstanding the fact that the Federal Rules of Evidence are not applicable to Florida state court proceedings and the Florida rule on judicial notice, Florida Statute 90.201 et seq. makes no distinction between adjudicative and legislative facts, Judge Baker's experts contended that he was not guilty of a violation of Canon 3B(7) because he was taking judicial notice of legislative facts (Hearing Tr.178-79, 198-99, 239-42, 245-46).

If there is a distinction between legislative and adjudicative facts under Florida law, it is clear that Judge Baker's inquiry was regarding adjudicative facts. Judge Baker, in his answer, admitted that at the time he had conversations with computer consultants and experts, he did so to "test his understandings of computer works and operations and explore different perspectives on the technical computer questions that came up during UBS v. Disney to be sure he was not overlooking something" [Answer, p.5, ¶ 2(h)]. In both the History of the Case (JQC EX-2) and his Memorandum of Ruling (JQC EX-1), Judge Baker stated that he asked the experts "if there were a practical way to approximate the cost to a retailer to

take the original UBS software and bring it up to the 'modified version' in use at Disney" and the experts advised Judge Baker that the cost of developing the changes and modifications could be determined by comparing lines of codes and functions on the original and modified versions of the software (JQC EX-1, pp.8-9; JQC EX-2, p.3). Thus, as the Hearing Panel found, Judge Baker "was further educating himself on the complexities of computer software valuation from a damage point of view" and "explor[ing] proof of damage with these computer experts" (Findings and Conclusions, pp.8, 12).

Charles C. Scott, a retired Illinois judge who appeared as an expert for Judge Baker, testified that Canon 3B(7) can be violated if a

> judge who has a factual point of view on some contested factual matter and he is calling people to find out if, for example, the defendant is a drunk, maybe he's calling the friends of the alleged drunk to find out what the drinking habits are. I think that would come under other communications; it would be ethically impermissible.

(Hearing Tr.190-91.) Yet, the evidence is overwhelming that that is precisely what Judge Baker did in UBS v.

Disney. In the colloquies with counsel in UBS v. Disney, and in Judge Baker's History of the Case and Memorandum of Ruling,[5] Judge Baker made it abundantly clear that he had a point of view on the contested issue of how damages involving computer software could be proven (Tr.44-47, 61) and he was seeking information from the computer experts to confirm his point of view.

ISSUE V

CANON 3B(7), AS APPLIED IN THIS CASE, IS APPLICABLE

Judge Baker contends that "the JQC interpretation [of Canon 3B(7)] is unreasonable, impractical . . . would lead to unavoidable, repeated unintentional violations and self-imposed judicial ignorance" (Response, p.31). The Hearing Panel rejected this contention, saying:

> We reject the argument that "other communications" is too vague or too broad and would force the judge into being the least informed person in the courtroom. There may well be

[5] Judge Baker begins his Memorandum of Ruling stating, "This case was tried and submitted to the jury on a false premise as to plaintiff's damages. This was done knowingly and intentionally by me, fully aware that plaintiff's verdict rendered by the jury would be fundamentally and fatally flawed" (JQC EX-1).

> circumstances and close questions as to other communications, but the present case is not one of them. A chance conversation about computers with a friend or spouse is not in question. Here, Judge Baker sought out expert advice from more than one expert.

(Findings and Conclusions, pp.14-15)(emphasis by the Panel). Judge Baker responds that "it must be remembered that the 'expert advice' obtained was from a close friend and a relative" (Response, p.37), but overlooks the fact that his consultation with the computer experts was not a chance conversation –- he sought out their advice.

Judge Baker complains that "he and his counsel repeatedly advised the JQC that he would follow whatever dictates the JQC chose to establish, but the JQC repeatedly refused this offer and instead demanded a trial" (Response, p.22). What Judge Baker wanted, however, was an intellectual debate with the JQC on how Canon 3B(7) was to be interpreted and applied. Judge Baker propounded interrogatories to the JQC in which he, after setting out his understanding of Canon 3B(7), asked whether the JQC contended that his interpretation and understanding of the Canon was incorrect; whether the JQC

contended that the Canon was a limitation or restriction on the independence of the judiciary; whether the JQC contended that the Canon was violated in various situations not relevant to the charge; whether the Canon places the same limitations on a judge as on jurors sitting in a case; and whether a judge violates the Canon if he attends a lecture by an expert witness on a subject that is relevant to a pending proceeding. The interrogatories then called on the Commission for a detailed explanation of its contentions. Judge Baker's Interrogatory Nos. 6, 8, 9, 10 and 11 and the Commission's responses thereto are submitted herewith as Appendix "A."

The JQC's answers to the interrogatories would not have been persuasive to Judge Baker and the trial did nothing to change his view that he did nothing wrong (Hearing Tr.105). The Hearing Panel's findings and conclusions are limited to the facts of the case and are not the pronouncement of a broad and unworkable interpretation of Canon 3B(7).

ISSUE VI

THE JQC'S PROCEDURES DO NOT VIOLATE FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS

Finally, Judge Baker asserts that the JQC's procedures and practices violate the due process guarantee of the Fourteenth Amendment (Response, p.37). Apparently, Judge Baker does not seek exoneration or a new hearing based upon due process grounds, but asks the Court to revisit the procedural due process issue and submits "some brief observations" (Response, p.38).

In In re Inquiry Concerning a Judge, Graziano, 696 So.2d 744, 750 (Fla. 1997), this Court held that procedural due process requires that a judge be given notice of the proceedings, that the judge be given an opportunity to be heard, that the proceedings against the judge be essentially fair and that the JQC be in substantial compliance with its procedural rules.

Apparently, Judge Baker believes that the formal hearing procedure with witnesses and "legal evidence" prevents "an open-minded inquiry to obtain all the information that could be helpful to an adjudicatory body that will later decide the case" (Response, p.40). In 1996, the investigative and adjudicative functions of the Commission were bifurcated to eliminate a perceived unfairness in the system. Florida Constitution,

Article V, Section 12 (1996 Amendment). See 1996 Committee Substitute for Senate Joint Resolution 978. In Graziano, which was heard before the 1996 bifurcation, this Court rejected the contention that due process was violated because the JQC was the decision-maker in both the preliminary determination of the existence of probable cause and the determination of the formal charges, saying: "As the reviewing court, we are obligated to study the record and independently assess the factual findings and recommendations of the JQC" (696 So.2d at 753). Accord In re Inquiry Concerning a Judge, Gridley, supra.

The facts regarding Judge Baker's conduct in UBS v. Disney are not in conflict, Judge Baker was given a full opportunity to be heard, the JQC was in substantial compliance with its procedural rules and the proceedings were essentially fair.

CONCLUSION

The findings of the Judicial Qualifications Commission are supported by clear and convincing evidence. The findings, conclusions and recommended disposition should be approved.

Respectfully submitted,

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Certificate of Service

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Certificate of Compliance

I DO HEREBY CERTIFY that the Reply of the Judicial Qualifications Commission to Judge Baker's Response to Order to Show Cause was prepared in Courier New 12-Point font.

_____

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